UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

SHANNON PEREZ, *et al*., *Plaintiffs*, v. STATE OF TEXAS, *et al*., *Defendants*.	CIVIL ACTION NO. SA-11-CA-360-OLG-JES-XR [Lead case]
MEXICAN AMERICAN LEGISLATIVE CAUCUS, TEXAS HOUSE OF REPRESENTATIVES (MALC), *Plaintiffs,* v. STATE OF TEXAS, *et al*., *Defendants*.	CIVIL ACTION NO. SA-11-CA-361-OLG-JES-XR [Consolidated case]
TEXAS LATINO REDISTRICTING TASK FORCE, et al., *Plaintiffs*, v. RICK PERRY , *Defendant*.	CIVIL ACTION NO. SA-11-CV-490-OLG-JES-XR [Consolidated case]
MARAGARITA V. QUESADA, et al., *Plaintiffs*, v. RICK PERRY, *et al*.,	CIVIL ACTION NO. SA-11-CA-592-OLG-JES-XR [Consolidated case]

Defendants.	)	
_____	)	
	)	
JOHN T. MORRIS,	)	CIVL ACTION NO.
	)	SA-11-CA-615-OLG-JES-XR
Plaintiff,	)	[Consolidated case]
	)	
v.	)	
	)	
STATE OF TEXAS, et al.,	)	
	)	
Defendants.	)	
_____	)	
	)	
EDDIE RODRIGUEZ, et al.	)	CIVIL ACTION NO.
	)	SA-11-CA-635-OLG-JES-XR
Plaintiffs,	)	[Consolidated case]
	)	
v.	)	
	)	
RICK PERRY, et al.,	)	
	)	
Defendants.	)	

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REPLY BRIEF OF THE NAACP AND AFRICAN AMERICAN CONGRESSPERSONS – 2011 CONGRESS AND HOUSE

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The Texas State Conference of NAACP Branches, Juanita Wallace, Rev. Bill Lawson, and Howard Jefferson (hereinafter, "NAACP Plaintiffs"), and Eddie Bernice Johnson, Alexander Green, and Sheila Jackson-Lee (hereinafter, "Congresspersons") (together, "Joint Plaintiffs") respectfully submit the following brief in reply to the post-trial brief of Defendants (Doc. No. 1272, October 30, 2014), and in support of the 2011 intentional discrimination and vote dilution claims brought by Joint Plaintiffs in trial.

Intentional Discrimination

Joint Plaintiffs have alleged that both the 2011 Congressional and State House plan are infected by intentional racial discrimination that violates the Fourteenth Amendment and Section 2 of the Voting Rights Act of 1965. This claim encompasses both the intentional manner in which the state diluted and abridged the voting strength of minority voters in the state, and the disparate and harmful treatment directed toward districts in which minority voters had already (or were about to) exercise their political voice. In its defense of its racially-discriminatory legislation, the State makes numerous critical errors of fact and law.

First, Defendants mischaracterize the types of evidence relevant to and sufficient to prove an intentional discrimination claim under the Fourteenth Amendment and Section 2 of the Voting Rights Act. State Br. at 8-9, 37. The Supreme Court has been quite clear: Plaintiffs in an intentional discrimination action are simply not required to prove that racial considerations predominated over all other considerations. *Arlington Heights v. Metro. Housing Dev. Corp*., 429 U.S. 252, 265-66 (1997). Specifically, the Court noted that "[r]arely can it be said that a legislature or administrative body operating under a broad mandate made a decision motivated solely by a single concern, or even that a particular purpose was the 'dominant' or 'primary' one." *Id*. at 265. The State's post-trial brief seems to suggest that Plaintiffs must somehow disprove or negate any possible partisan considerations that the State may have taken into account in order to win on their intentional discrimination claims. That is explicitly not the burden Plaintiffs bear under the law established in *Arlington Heights*, and the correct standard under that line of cases is explained in Joint Plaintiffs' Post-Trial Brief at 7-10.

The State also emphasizes that in order to succeed on their intent claims, Plaintiffs must prove both discriminatory intent and effect. State Br. 11. It is difficult to even respond to a

suggestion as specious as the one Texas makes—that Plaintiffs have failed to demonstrate that the challenged plans have a discriminatory effect even if they were enacted with a discriminatory intent. Plaintiffs have spent weeks in trial documenting the effect that the 2011 plans have had on voters of color, and the interim plans implemented by this Court demonstrated conclusively that minority voters were harmed and silenced by the 2011 plans. For example, the carving up of minority voters in Tarrant County in the congressional plan had the discriminatory result of preventing minority voters from electing the candidate of their choosing. That gross cracking was remedied in the interim plan, and minority voters elected African-American Congressman Marc Veasey. Texas dissolved House District 149 in the 2011 House plan—a district in which a diverse group of voters elected the first Vietnamese-American representative to the State House. Again, when that discriminatory action was remedied, minority voters successfully elected their candidate of choice. These are just but a few of the examples of the discriminatory effect wrought by Texas' intentionally discriminatory line-drawing.

The *Arlington Heights* analysis that guides a court's consideration of intentional discrimination claims has been properly articulated and applied by Plaintiffs, despite the State's suggestion to the contrary. State Br. at 37. In determining whether there is discriminatory intent, "direct or indirect circumstantial evidence, including the normal inferences to be drawn from the foreseeability of defendant's actions" may be considered. *United States v. Brown*, 328 F.3d 787 (5th Cir. 2003); *McMillan v. Escambia County*, 748 F.2d 1037, 1047 (5th Cir. 1984). The State asserted that "Plaintiffs' argument is legally flawed because they wrongly assume that *Arlington Heights* identified the elements of an intentional-discrimination claim, to be proven (according to Plaintiffs) by checking off the factors listed in the opinion." State Br. at 37. The plain language of the Court in *Arlington Heights* resolves any potential dispute on the weight to be attributed to

the *Arlington Heights* factors: "[d]etermining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." 429 U.S. at 266. The listed factors identify, "without purporting to be exhaustive, subjects of proper inquiry in determining whether racially discriminatory intent existed." *Id*. at 268. Indeed, in the *Feeney* case, upon which the State relies heavily, the Court reaffirms the necessity of relying on the *Arlington Heights* factors to prove up an intentional discrimination case: "[p]roof of discriminatory intent must necessarily usually rely on objective factors, several of which were outlined in *Arlington Heights* v. *Metropolitan Housing Dev. Corp*. The inquiry is practical. What a legislature or any official entity is "up to" may be plain from the results its actions achieve, or the results they avoid." *Pers. Adm'r. of Massachusetts v. Feeney*, 442 U.S. 256, 279 n. 24 (1979) (internal citation omitted). No one factor is solely dispositive, and more factors beyond those listed may considered.

A second critical error made by Texas with regard to its analysis of intentional discrimination law is the complete absence of discussion of the incredibly non-compact shape of a large number of districts in both the 2011 congressional and state house redistricting plans. The shapes of these districts and the indisputable result of those shapes—obstructing rapidly growing minority communities from participation in the political process through the election of candidates of their choice—is deeply relevant to an inquiry into the intentions of the legislature. For reasons detailed in the post-trial briefs and findings of fact of numerous plaintiff groups, *see, e.g.*, Joint Plaintiffs' Post-Trial Brief at 21, United States Findings of Fact and Conclusions of Law at 24-25, alleged reliance on partisan data simply cannot explain the tortured shape of districts in both plans. Indeed, the state acknowledges intentionally splintering Latino voters from African American voters in congressional districts in Tarrant County. State Br. at 130.

District lines are drawn, in that county and in others, perfectly on the basis of race. See map from Post-trial brief. Precincts are split perfectly on the basis of race. Tr., Aug. 14, 2014, 408:22-409:1 (Arrington). Texas officials admit that any attempts to discern political data at the block level are inaccurate and uninformative. Tr., July 14, 2014, 257:25-259:22, 270:24-271:5 (Dyer). Ironically, Texas seems to rely heavily on the purported ignorance of its well-trained experts as a defense against intentional discrimination. *See, e.g.*, Tr., July 18, 2014, 1590:14-25, 1599:22-24 (Interiano) (mapdrawer did not know that racial shading existed on the block level and did not know that political data on the block level was unreliable). This cynical ploy must be rejected. Having been involved in high-stakes voting rights litigation after every single redistricting cycle since the 1970s, and having been found to violate minority voting rights each time, Texas knew what it was doing. The grossly non-compact districts it drew did what they intended to do—they fractured cohesive and growing minority communities, from El Paso across the entire length of the state, from electing their candidates of choice.

Third, Defendants' persistent reliance on a partisan gerrymandering defense and *Easley v. Cromartie*, 532 US 234 (2001), is misplaced and would lead to an absolutely absurd result. On that front, there are two erroneous misunderstandings: 1. *Easley*, the racial gerrymandering case out of North Carolina was the result of long and tortured litigation over the state's desire to create an African-American opportunity district in the central part of the state. In the second of the four Supreme Court cases on North Carolina's Congressional District 12, *Shaw v. Hunt*, 517 U.S. 899 (1996) ("*Shaw II*"), the Court was not satisfied with the mere assertion that the challenged congressional district was demonstrated simply a district designed to "protect[] Democratic incumbents," when it was apparently that race was such an uncompromising focus. *Id*. at 902-903, 905-907. When rebuked by the Supreme Court for its excessive reliance on race,

North Carolina drew a significantly more compact district, and acted to draw a constitutionally-acceptable district. *Hunt v. Cromartie*, 526 U.S. 541, 543 (1999). Indeed, the Court acknowledged how different the plan enacted in response to *Shaw II* was from the originally challenged plan: "The State's 1997 plan altered District 12 in several respects… [t]he new District 12 splits 6 counties as opposed to 10…With these changes, the district retains only 41.6% of its previous area, and the distance between its farthest points has been reduced to approximately 95 miles. *Id.* at 544 (internal citations omitted). It was not the factual case that the state of North Carolina consistently relied upon and the Supreme Court approved a defense of partisan gerrymandering for its non-compact district. Only after the state responded to the identified constitutional violation, and drew a much more compact district was it able to successfully rely upon its assertions that partisan interests drove the shape of the district. Additionally, the Court rejected the use of unreliable data in support of a defense of partisan gerrymandering. *Easley v. Cromartie*, 532 U.S. 234, 245 (2001). In that case, the unreliable data was voter registration data instead of voter behavior. *Id*. But the same logic is true in this case. Texas may not rely upon indisputably-inaccurate block-level political data to claim it acted on the basis of politics, not race. Thus, as a factual matter, Texas simply cannot rely upon *Easley* because *Easley* does not provide guidance applicable to the instant situation.

2. The partisan gerrymandering defense to intentional racial discrimination cannot be applied across the board the way that Texas argues. The instant situation is one where, *at best*, the State admits to using partisanship as a proxy to discriminate against voters of color. Using partisanship that way unequivocally subjects the State's line-drawing to exacting scrutiny by a reviewing court. *Bush v. Vera*, 517 U.S. 952, 968 (1996). Moreover, neither the Supreme Court's racial gerrymandering jurisprudence nor its Voting Rights Act jurisprudence can be read

to tolerate gamesmanship with voters who have historically been excluded from the political process—like the gamesmanship Texas demonstrates here. Using partisanship as a talismanic defense against discrimination claims, contrary to the State's assertions, essentially gives the State an inexhaustible free pass to discriminate against voters of color. If Plaintiffs cannot produce "smoking gun" evidence, there is no situation in which they would be able to rebut that talismanic claim. That is clearly not what the Supreme Court has indicated to be the proof necessary to win an intentional discrimination case, and thus Defendants' defense cannot be logically applied in the way they try to apply it.

What Texas is attempting to do is to undermine the viability of the Voting Rights Act in clear contravention of the desires of the United States Congress and presidents of both parties who have signed the Act into law. Indeed this defense makes a pure mockery of the law. Texas knew it was harming racial and ethnic minorities and it was clearly and intentionally punishing them in order to limit their ability to effectively participate in the political process. Congresspersons Johnson, Jackson-Lee and Green all communicated their concerns in different ways to the Legislative Leadership or their designees, and numerous minority Representatives spoke out against the plans when they were being discussed besides the testimony that many groups like those involved in this case presented to the Texas Legislature when redistricting was being considered. Defendants knew who they were going to harm and that is exactly what they proceeded the way that they did.

Defendants constructed a redistricting process that allowed them to effectuate their goals. For example, in a meeting that was arranged by Gerardo Interiano that included representatives of the Attorney General, Speaker, Lieutenant Governor and others, Congresswoman Johnson was flatly told that Congressman Lamar Smith would be the coordinator and that Eric Opiela was the

designated person for creating the Congressional maps, so all issues should be sent through either of those individuals. 2014 Tr. at 684:3-7 (Johnson). This clearly evidences the State's alliance with Mr. Opiela and that he was officially working as part of the State team. Exhibit 75 of the NAACP and Congressional Intervenors shows that Congresswoman Johnson followed through with the agreement with State authorities and early on she communicated to them the location of her home, office, precinct number and other variables that somehow were disregarded later on. The communications are with Congressman Smith and Mr. Opiela. When communications are sent to Congressman Smith, Mr. Opiela then replies. Thus, the information was being relayed from Congressman Smith to Mr. Opiela, at least when it was convenient for the State.

Additionally, as can be seen in Exhibit 73 of the NAACP and African-American Congresspersons, when asked about the "nudge factor" desire and a request for census tract data with demographic information statewide, Mr. Interiano informed Mr. Opiela that he would work with him on the project but needed more clarification. It is clear that Mr. Interiano were working hand-in-hand. The end result was consistent with the types of districts clearly envisioned by Mr. Opiela in those emails. In regards to Dr. Murray's comments on the "nudge factor," he indicated that one would only need to nudge Congressional District 23 just a little bit to make a significant difference. "District 23 is the most closely contested district in our state. Nudging a little bit there would have more impact than any other district in Texas." Tr. 1494: 17-21 (Murray).

Finally, intentional vote dilution does not, as Defendants allege, create a duty to maximize. State Br. at 23. This reduction to absurdity ignores the facts, and what the unaided eye can easily detect simply by looking at the 2011 enacted plans: Texas did not fail to maximize the number of minority opportunity districts—it horrendously contorted district lines across the

map in order to crack minority communities and avoid drawing compact, naturally occurring districts that would award political power to the very people responsible for Texas' increased representation. This is an important distinction. If this were a situation in which Texas drew sensible, reasonably compact districts that did not aggressively splinter minority communities, its arguments that failure to maximize the number of minority cannot be considered evidence of intentional discrimination might be more persuasive. But Texas did not do that. And the challenged plans demonstrate a far more invidious reality than a mere failure to maximize.

Arguing to extremes the way that Defendants do results in further absurdity. To wit: because certain minority voters in Texas tend to be cohesive in their support of a particular party at this given time in history, the State can assert that it is just discriminating against the party that minority voters support, not minority voters themselves. And according to the State, plaintiffs cannot rebut this without the equivalent of a smoking gun. But were those minority voters not cohesive, they would have no actionable Section 2 claims, because they could not satisfy the second prong of *Gingles*. Either way, minority voters lose, and Texas is allowed to continue its deplorable pattern of minimizing or silencing the voice of minority voters. Defendants' arguments against this Court finding that the State engaged in intentional discrimination all fall short.

Vote Dilution under Section 2 of the VRA

Defendants' singular focus on the intent claims ignores this Court's ruling that none of the 2011 claims are moot and leaves unrebutted the supplemental evidence presented in the 2014 trial that support Joint Plaintiffs' arguments that this Court's second interim plans do not remedy all of the vote dilution in the 2011 plans. The State's trial brief from 2011 obviously does not

address that supplemental information, either. As Joint Plaintiffs documented in detail in both their 2011 and 2014 trial briefs and proposed findings of fact, Section 2 and constitutional violations persist in the second interim plans because they were not corrected from the 2011 plans. While this Court, as directed, applied a standard akin to a preliminary injunction standard in assessing the merits of the 2011 claims in the construction of the second interim plans, the supplemental evidence warrants a conclusion that additional remedy is needed.

While the State's brief is focused almost entirely on the intent claims, Defendants did address, albeit incorrectly, the current state of the law in regard to coalition districts. Contrary to Defendants' assertions, the Supreme Court did not, in *Perry v. Perez*, 132 S. Ct. 934 (2012), resolve the issue of whether coalition districts can be required by the Voting Rights Act. State Br. at 26 n. 14. The Supreme Court was only reviewing the creation of coalition districts in the specific context of interim plans, where this Court had explicitly and intentionally refrained from making the kind of specific findings that would be necessary to support the VRA-mandated creation of coalition districts. Orders on First Interim Plans, Doc. 528 at 1 (Nov. 23, 2011) and Doc. 544 at 1-2 (Nov. 26, 2011). Indeed, that Supreme Court opinion was *per curiam*. If Defendants' interpretation of the significance of that ruling was correct, that would mean that the dissenting Justices in *Bartlett v. Strickland*, who implied that they believed that the Voting Rights could compel the drawing of districts that were non-majority single race, 556 U.S. at 24, had a dramatic change in opinion between 2009 and 2012. That is implausible and without legal precedent. A much more plausible reading is that the Supreme Court did not reach the question of whether coalition districts are compelled by the Voting Rights Act, but rather, consistent with precedent in every Circuit Court of Appeals except the Sixth Circuit, recognized that certain factual findings are a condition precedent to the ordering of a jurisdiction to draw a coalition

district. *See League of United Latin Am. Citizens Council No. 4434 v. Clements*, 999 F.2d 831, 864 (5th Cir. 1993) (*rehearing en banc*), *cert. denied* 114 S. Ct. 878 (1994); *Badillo v. City of Stockton*, 956 F.2d 884, 891 (9th Cir. 1992); *Concerned Citizens of Hardee County v. Hardee County Bd. of Comm'rs*, 906 F.2d 524 (11th Cir. 1990); *Latino Political Action Committee v. City of Boston*, 609 F. Supp. 739, 746 (D.C. Mass. 1985), *aff'd*, 784 F.2d 409 (1st Cir. 1986); *but see Nixon v. Kent County*, 76 F.3d 1381 (6th Cir. 1996) (*en banc*).

Next, in rebutting intentional vote dilution claims on a district-specific basis, Defendants fail to acknowledge pertinent facts and/or misrepresent the evidence in the following ways:

The treatment of minority voters in the Dallas-Fort Worth region of the 2011 congressional plan is perhaps the most egregious and certainly most easily understood example of the legislature cracking apart minority populations based solely on the color of their skin and stranding them in districts that would not allow them to elect the candidates of their choice. If the legislature's only motivation was to assign Democratic voters to safe Republican districts, there is no logical explanation for the parsing apart of black and Latino communities in Tarrant County. The State has declared time and time again (incorrectly) that the Voting Rights Act did not compel the drawing of any districts that were not majority single race. The state thus had no compelling reason to use race to separate black voters from Latino voters or even use race as the sole factor in defining a community of interest. "[T]o the extent that race is used as a proxy for political characteristics, a racial stereotyping requiring strict scrutiny is in operation." *Bush v. Vera*, 517 U.S. 952, 968 (1996). Thus, under the State's own justifications, the damage wrought on Dallas-Fort Worth voters of color fails constitutional scrutiny. Furthermore, Defendants are flatly wrong in asserting that Plaintiffs failed to prove any discriminatory effect on voters in the region because the 2011 plan was never enacted. First, the classification by race is a cognizable

harm in and of itself. *Shaw v. Reno*, 509 U.S. 630, 658 (1993). Second, when comparing the 2011 congressional plan to the second interim Court-ordered plan, the effect of Texas' discriminatory actions is irrefutable. The plan had the intended effect of ensuring that voters of color in Tarrant County had no opportunity to participate in the political process.

The State's defense of Congressional District 25 fares no better when it comes to plausibility.[1] The disingenuousness of the State's protestations that it tried to keep African-American and Latino communities whole in the Dallas-Fort Worth region is further highlighted in the line-drawing in Travis County. There no effort was taken to keep African-American communities whole. Indeed, the record is replete with unrebutted evidence of the fracturing of historic African-American communities in Travis County. *See* Joint Plaintiffs Post-Trial Brief, at 43-44. In C185, poor African-American communities to the east of Interstate 35 are split from each other and are stranded in districts based out of West Austin or West Travis County—regions that are predominantly Anglo and wealthy. Tr., August 13, 2014, 1031:1-1032:12 (Travillion). And the State plain ignores the implication that the *Bartlett* decision had for Congressional District 25—the warning that, regardless of whether a crossover district was compelled by the Voting Rights Act, the intentional dismantling of a functioning crossover district would run afoul of the Fourteenth Amendment. *Bartlett*, 556 U.S. at 24. Congressional District 25 was such a district, and the State purposely dismantled it.

The State's discussion of Bell County redistricting in the state house plan misstates the testimony in the record and paints a picture that is not consonant with the evidence heard by this Court during trial in July 2014. One of the few credible elements of Rep. Aycock's testimony was his declaration that he was not capable of drawing districts in RedAppl, and as such, Mr. Downton performed that part. Tr., July 18, 2014, 1755:1-9 (Aycock). But the State avers that

[1] Again, the Joint Plaintiffs adopt the Rodriguez Plaintiffs' briefing with respect to Congressional District 25.

Aycock was the primary drawer. State Br. at 50. This raises serious red flags. Moreover, the obvious effect of the district lines on the city of Killeen—a city that has experienced explosive minority growth and has begun electing the candidates of choice of minority voters at the local level—can only be seen as the natural and intended consequence of the splitting of that city in half. *See* Joint Plaintiffs' Post-Trial Brief at 31-33. Now those politically active voters of color are split between two rural, Anglo districts.

With regard to House District 26, Defendants' discussion of the fragmenting of minority populations seems to rest solely on the fact that the map drawn for Fort Bend County was approved by all the delegates from that county—two Republicans and one Democrat. Rather than this being a member-drawn map, Gerardo Interiano testified that he drew it with input from the members. Tr., July 18, 2014, 1604:9-15, 1605: 1-3. He specifically noted that the two Republican members wanted "to remain Republican through the decade," even though Mr. Interiano, who was working on the map with them, acknowledged knowing that this was a diverse and rapidly growing area of the state. Tr., July 18, 2014, 1607:6-11; Tr., July 18, 2014, 1571: 2-4. The State did nothing to address Joint Plaintiffs' discriminatory effects claims under Section 2, and their intent defense relies on the factfinder ignoring Mr. Interiano's role and stated purposes behind the line drawing.

With respect to Harris County and House District 149, Texas once again ran afoul of the Supreme Court's warning in *Bartlett*: regardless of what the Voting Rights Act compelled, Texas intentionally eliminated a performing minority district (in this case, a coalition district as opposed to a crossover district). This creates a Fourteenth Amendment violation.

Finally, the State's brief is peppered with assorted additional inaccuracies and untenable statements. Defendants' rebuttal to the glaring inequity between the population growth in Texas

and the failure to create any new minority opportunity districts is to claim that "Congressional districts are apportioned to the State, not to new population." State Br. at 110. Those districts were apportioned to Texas *solely because of* the new minority population in the state. The idea that Texas could avoid creating additional minority opportunity districts because of population dispersal and citizenship rates is simply not credible based on a cursory review of every one of plaintiffs' demonstrative maps, all of which create additional minority opportunity districts. Finally, Defendants suggest that Congressional District 27 was configured so as to anchor Nueces County with counties to the north in response to public commentary. State Br. at 127. But this completely ignores the record evidence that such a configuration was strongly opposed by the public. Def. Ex. 574. This selective memory is just another example of the Texas' inconsistent logic and unsupported defense.

CONCLUSION

Texas' defense of the 2011 State House and Congressional redistricting plans require them to ignore huge chunks of evidence from both the 2011 and 2014 trials—so much so that it is almost hard to believe that the parties are talking about the same trial. The rote assertion of partisanship as the reason for horribly non-compact district lines that split apart communities of interest based on the color of their skin is akin to the proverbial act of putting a dress on a hog and trying to pass it off as the belle of the ball. It fools no one, and does not change the end result—which is that despite enormous population growth and a demonstrated ability to elect the candidates of their choice when unimpeded, minority voters in Texas were once again subjected to racially discriminatory redistricting practices in 2011. Nothing much has changed, and nothing will if this Court does not act to fully enforce minority voting protections.

For all of the foregoing reasons, and those enumerated in the Joint Plaintiffs' 2011 and 2014 Post-Trial Briefs, Joint Plaintiffs respectfully submit to the Court that the 2011 congressional redistricting plan (C185) and state house redistricting plan (H283) violate both the Fourteenth Amendment and Section 2 of the Voting Rights Act.

Dated this, the 4th day of December, 2014.

Respectfully submitted,

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